SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

Term, 1969

No. 1264

GLENN C. WOLFE,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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IN THE SUPREME COURT OF THE UNITED STATES

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No.

Glenn C. Wolfe,

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v.

Commonwealth of Pennsylvania,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

OPINION BELOW

The Opinion of the Supreme Court of Pennsylvania affirming the sentence of the lower court is reported in 433 Pa. 141 and in 249 A. 2d 316.

JURISDICTION

The opinion of the Supreme Court of Pennsylvania was handed down on January 15, 1969, affirming the sentence of the lower court. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED

Is it unconstitutional under the Federal Constitution to convict a liquor licensee of the crime of permitting the sale of alcoholic beverages to a minor when the licensee is not present, has no personal knowledge of the said sale, and had given his bartender specific instructions on several occasions not to sell to minors?

STATEMENT OF THE CASE

On November 22, 1966, two liquor agents of the Pennsylvania Control Board, upon entering the National Hotel in Mechanicsburg, Pennsylvania, discovered that the bartender, William Neff, had sold a bottle of beer to a minor, Robert A. Eberly.

It was brought forth in the evidence that the defendant, Glenn C. Wolfe, the licensee, was not present at that time. He was in Harrisburg, which is several miles from Mechanicsburg. He knew nothing of the sale.

The bartender testified that he had been instructed repeatedly by the defendant that he should not serve minors.

There was no evidence presented that the minor in question, or other minors, had previously frequented the licensee's place of business.

REASONS FOR GRANTING THE WRIT

1. It is wrong to give a person a criminal record for a crime in which he did not take part, had no knowledge of, and gave specific instructions against. It is a violation of the 14th Amendment to the Federal Constitution.

In the instant case, the Supreme Court of Pennsylvania was asked to reconsider the decision that they had handed down in 1959 on the same set of facts in *Commonwealth v. Koczwara,* 397 Pa. 575, 155 A. 2d 825 (1959).

In the majority opinion in the *Commonwealth v. Koczwara* case (supra), the Pennsylvania Supreme Court admitted that they "strained" to reach the decision that they did, and held to the untenable position that a sentence of imprisonment was unconstitutional but that a sentence of a fine was all right. The Court stated:

> "The Courts of the Commonwealth have already strained to permit the legislature to carry over the civil doctrine of respondeat superior and to apply it as a means of enforcing the regulatory scheme that covers the liquor trade. We have done so on the theory that the Code established petty misdemeanors involving only light monetary fines. It would be unthinkable to impose vicarious criminal responsibility in cases involving true crimes. Although to hold a principal criminally liable might possibly be an effective means of enforcing law and order, it would do violence to our more sophisticated modern-day concepts of justice. Liability for all true crimes, where-

in an offense carries with it a jail sentence, must be based exclusively upon personal causation. It can be readily imagined that even a licensee who is meticulously careful in the choice of his employees cannot supervise every single act of the subordinates. A man's liberty cannot rest on so frail a reed as whether his employee will commit a mistake in judgment. See, Sayre, Criminal Responsibility for Acts of Another, 43 Harv. L. Rev. 689 (1930)."

In the same majority opinion, the Honorable Court also said:

> "Such sentence of imprisonment in a case where liability is imposed vicariously cannot be sanctioned by this Court consistently with the law of the land clause of Section 9, Article I of the Constitution of the Commonwealth of Pennsylvania.[7]"

Footnote 7 set forth the following portion of Section 9, Article I of the Constitution of the Commonwealth of Pennsylvania:

> "[7] Sec. 9. '. . . nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.' "

Justice Michael A. Musmanno in his dissenting opinion in the same case stated:

> "The Majority of this Court is doing something which can find no justification in all the law books which ornament the libraries and enlighten the judges and lawyers in this Commonwealth. It sustains the conviction of a person for acts admittedly not committed by him, not performed in his presence, not

accomplished at his direction, and not even done within his knowledge. It is stigmatizing him with a conviction for an act which, in point of personal responsibility, is as far removed from him as if it took place across the seas."

Later in his dissent, Justice Musmanno said:

"The Majority Opinion finds the imprisonment part of the sentence contrary to law. Thus, in addition to the other things I have had to say about the Majority Opinion, I find myself compelled to pin on it the bouquet of inconsistency. The Majority says that it cannot permit the sentencing of a man to jail 'for acts about which he had no knowledge and over which he had little control.'

"It says: 'Such sentence of imprisonment in a case where liability is imposed vicariously cannot be sanctioned by this Court consistently with the law of the land clause of Section 9, Article I of the Constitution of the Commonwealth of Pennsylvania.' But if the Majority cannot sanction the incarceration of a person for acts of which he had no knowledge, how can it sanction the imposition of a fine? How can it sanction a conviction at all?

"The Majority enlarges on its inconsistency when it says: 'Our own courts have stepped in time and again to protect a defendant from being held criminally responsible for acts about which he had no knowledge and over which he had little control.' If it is wrong to send a person to jail for acts committed by another, is it not wrong to convict him at all? There are those who value their good names to the

extent that they see as much harm in a degrading criminal conviction as in a jail sentence. The laceration of a man's reputation, the blemishing of his good name, the wrecking of his prestige by a criminal court conviction may blast a person's chances for honorable success in life to such an extent that a jail sentence can hardly add much to the ruin already wrought to him by the conviction alone.

"The Majority extends a sympathetic hand to prevent the jail doors from clanging shut behind John Koczwara. It says: 'We would be utterly remiss were we not to do so under these facts.' But is it not remiss in refusing to save Koczwara's constitutional prerogatives? Is it not remiss in not striking down this conviction which engrafts upon the criminal code something which up until this time has been unheard of in the Commonwealth of Pennsylvania? Is it not remiss in not reversing a conviction which cannot be based on any written provision of the law? Is it not remiss in giving to a criminal statute a broad interpretation (against the accused) instead of a strict interpretation as our decisions have proclaimed hundreds of times?"

In the following five Pennsylvania cases, the Courts held that licensee's knowledge, assent, or promotion of the sale by an employee to a minor, when the licensee was not present, was a requirement for a conviction.

As far back as *Commonwealth v. Zeigler,* 10 Sadler 404, 14 A. 237 (1888), the Court was requiring that the owner either knew or in any manner assented to or promoted the illegal sale.

In *Commonwealth v. Newhard,* 3 Pa. Superior Ct. 215 (1897), the Court recognized that, generally, the fact that an illegal sale of intoxicating liquor to minors took place in the absence of, and contrary to the orders of, the defendant licensee would constitute a good defense to the prosecution of said defendant on account of such sale.

In *Commonwealth v. Titlow,* 28 Pa. County Court 341 (1903), it was held that a licensee could not be convicted of selling liquor to persons of known intemperate habits, where it appeared that such sales were made by defendant's bar employee after the defendant had given him express and positive instructions not to sell to such persons.

In *Commonwealth v. Martin,* 186 Pa. Superior Ct. 412 (1958), the test was whether the defendant's presence on the premises, and her control over the same, indicated that she knew and assented to the illegal sale of alcoholic beverages.

In *Commonwealth v. Kempisty,* 191 Pa. Superior Ct. 602 (1960), the Honorable Court's decision in the *Koczwara* case (supra) was analyzed and distinguished. In that case the absent licensee was charged with contributing to the delinquency of a minor. The bartender, the defendant's son, had sold to a minor while his mother was upstairs sleeping. The Superior Court reversed the Dauphin County Court and held that the demurrer should have been sustained.

In *Commonwealth v. Morakis,* 208 Pa. Superior Ct. 180 (1966), the defendant was charged with vicarious criminal responsibility, because while he was out of state his foreman hired a minor under 18 years of age, who was injured during the first day of his employment. The Su-

perior Court reversed the Allegheny County Court, and held that the employer was not criminally responsible. In that case, too, the *Koczwara* opinion (supra) was discussed.

In *Commonwealth v. Wydo,* 38 D. & C. 2d 420 (1964), President Judge Dale F. Shughart, specially presiding, the same trial Judge as in the instant case, sustained a demurrer where the Commonwealth attempted to place vicarious criminal responsibility on a mine superintendent after an explosion in the Robena No. 3 Mine of the United States Steel Company at Garads Fort in Greene County, in which 37 miners were killed.

It is pointed out that President Judge Dale F. Shughart, who has presided over the Cumberland County Courts since 1947, said in his charge in the instant case:

> "I am sure several of you have been on other juries and have heard me instruct you regarding your responsibility, and you have heard me say that you have to take the law as I give it to you, whether you agree or not with that law. And this is one of the cases when you may not agree with the law. As a matter of fact, maybe I don't agree with the law. But I am bound by the decision of the appellate courts, and I will attempt to give you the law as I interpret their decisions to be, although there is something in this case, as we will see in a minute, that may be contrary to our own individual views. But you are bound to accept the law as I give it to you and not as you think it might be . . . ."

Clearly, there is an understandable reluctance on the part of the Court to hold a defendant criminally liable

vicariously. In the *Koczwara* case (supra), the Pennsylvania Supreme Court held that it would be unconstitutional to put a defendant in jail for vicarious criminal liability. Certainly it is logical that it is also unconstitutional to give him a criminal record. Just as in the child labor case and the mining case set forth above, the Commonwealth has adequate safeguards, other than resorting to a criminal charge. In the Liquor Code violation cases, the Commonwealth has an adequate remedy in the right to suspend and revoke a license, when an offense is committed without the presence, knowledge, consent, or approval of the licensee, and, in fact, contrary to his specific instructions. Clearly, this is both the constitutional and the better method, rather than pursuing a vicarious criminal charge against the licensee, which is both unconstitutional and the poorer method.

2. A liquor control board of any State has an adequate safeguard to deter sales of alcoholic beverages to minors.

Why do Courts *strain* to find a licensee criminally responsible for a sale to a minor in his absence, and against his express instructions? The answer is obvious. The Courts are concerned over preventing sales to minors. However, isn't there an adequate remedy? Certainly there is, and it is one in which the Commonwealth doesn't have to close its eyes to its own Constitution, as well as the Federal Constitution. The Commonwealth has the power to suspend and to revoke licenses. This is in itself a great deterrent, for it can be an economic catastrophe to the licensee, but far more important, it is a remedy that is *honorable* to the licensee. The said licensee can come before a representative of the Pennsylvania Liquor Control

Board, and receive a revocation, a suspension, or a suspension that can be waived by a fine. On the other hand, to charge the licensee with a crime, brings him before a local justice of the peace or magistrate. His case then goes before a grand jury in his county. He then comes into arraignment court, where in Cumberland County he is searched (a custom that was adopted after the unfortunate murder of John D. Faller, Esquire, in our Courtroom on August 2, 1955), and made to sit with the other defendants. He is called before the Bench in a crowded courtroom. He then returns for a trial, and goes through the same procedure. He would be subject to the same stigma of being searched, and sitting with the other defendants, even if he was entering a plea of guilty.

Again referring to the Majority Opinion in the *Koczwara* case (supra), it was stated:

> "It can be readily imagined that even a licensee who is meticulously careful in the choice of his employees cannot supervise every single act of the subordinates. A man's liberty cannot rest on so frail a reed as whether his employee will commit a mistake in judgment."

In the *Bayer Liquor Licene Case,* 200 Pa. Superior Ct. 210 (1963), the Court talks of the distinction between the civil sanction of a suspension or revocation of a liquor license on the one hand, and a criminal prosecution on the other hand. The Court said:

> "The answer is that the instant proceeding is not a criminal prosecution, but the imposition of a civil sanction. A liquor license may be suspended or revoked for violations of the law by employes even

though there is no evidence that the licensee knew of such violations."

The Pennsylvania Supreme Court has pointed out, "A proceeding to suspend or revoke a license under the liquor laws has always been considered civil and administrative and not criminal in nature." *Tahiti Bar, Inc. Liquor License Case,* 395 Pa. 355, 364 (1959).

There is no question but that the Pennsylvania Liquor Control Board has the right to suspend or revoke the license of a licensee, even though he is not present at the time, and has no knowledge of the illegal act of his employee. *Glass Door Liquor License Case,* 193 Pa. Superior Ct. 416 (1960); *East End Social Club of Frankford Liquor License Case,* 193 Pa. Superior Ct. 583 (1960); *Bayer Liquor License Case,* 200 Pa. Superior Ct. 210 (1963); *Anthony Wayne Bar and Restaurant, Inc. Appeal,* 42 D. & C. 2d 712 (1966), affirmed without an opinion in 209 Pa. Superior Ct. 756 (1967).

3. There is a definite split of authority among the State courts on this point of law. A decision by the United States Supreme Court on this point is needed for the guidance of all of the States.

There are two articles discussing this split of authority. One is in 139 *A.L.R.* 306, entitled "Criminal Responsibility of One Authorized Generally To Sell Intoxicating Liquors for Particular Illegal Sale Thereof by Employee or Agent." The other discussion of the subject appears in 30 *Am. Jur.,* Intoxicating Liquors, 245, 284, 285 and 286.

Cases holding that the licensees are criminally responsible include:

Hershorn v. People (Colo.), 113 P. 2d 680 (1941);

Walters v. State (Ind.), 92 N.E. 537 (1910);

State v. Wheat (Kan.), 292 P. 293;

Nadorff Bros. v. Louisville (Ky.), 137 S. W. 854 (1911);

State v. Anderson (La.), 54 So. 344 (1911);

Haskins v. State (Md.), 131 A. 2d 282 (1957);

People v. Longwell (Mich.), 79 N.W. 484 (1899);

State v. Lundgren (Minn.), 144 N.W. 752 (1913);

State v. Brown (Or.), 144 P. 444 (1914);

State v. Schull (S.D.), 279 N.W. 241 (1938);

State v. Gilmore (Vt.), 68 A. 658 (1908);

O'Donnell v. Comm. (Va.), 62 S.E. 373 (1908);

State v. Constantine (Wash.), 86 P. 384 (1906);

State v. Nicholas (W.Va.), 69 S.E. 304 (1910);

State v. Grams (Wis.), 6 N.W. 2d 191 (1942).

Cases holding that the licensees are not criminally responsible include:

State v. Lamperelli (Conn.), 106 A. 2d 762 (1954);

State v. Fagan (Del.), 74 A. 692 (1909);

Rosenbaum v. State (Ind.), 57 N.E. 156 (1900);

State v. Schultz (Iowa), 50 N.W. 2d 9 (1951);

Comm. v. Stevens (Mass.), 26 N.E. 992 (1891);

State v. Neal (N.C.), 45 S.E. 756 (1903);

State v. Pinto (N.J.), 29 A. 2d 180 (1942);

People v. Gar Bob Corp., 266 N.Y.S. 2d 771 (1966);

State v. Coleman (Mo.), 266 S.W. 2d 614 (1954);

Ollre v. State (Tex.), 123 S.W. 1116 (1909).

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,
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APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

No. 461 January Term, 1968

Commonwealth of Pennsylvania

v.

Glenn C. Wolfe,

Appellant

Appeal from the Judgment of the Superior Court, No. 637 October Term, 1967

OPINION OF THE COURT

O'Brien, J.; filed January 15, 1969:

Appellant, holder of a hotel liquor license, was convicted of violating §4-493(1) of the Liquor Code, Act of April 12, 1951, P. L. 90, art. IV, §433(1), 47 P.S. §4-493(1), as amended, prohibiting the sale of liquor to minors. After his motion in arrest of judgment was denied, he was fined $300.00 and ordered to pay the court costs. The Su-

perior Court affirmed per curiam, and we allowed an appeal.

It is undisputed that appellant was not present at the time the bartender made the sale, had no personal knowledge of the sale, and had given his bartender specific instructions not to sell to minors. Appellant urges that under these circumstances, it is a denial of due process to impose vicarious criminal liability on him.

We disagree, for two reasons. First, in order for appellant's contention to prevail, we would have to overrule our decision in Commonwealth v. Koczwara, 397 Pa. 575, 155 A. 2d 825 (1959). This we decline to do; we have reviewed that decision and reaffirm it here. We quote at length from Professor Sayre, Criminal Responsibility for the Acts of Another, 43 Harv. L. Rev. 689, 722 (1930):

> "To hold the master liable if he fails to prevent his servant from committing the prohibited conduct will have a powerful deterrent effect. On the other hand, to require from the state actual and positive proof of specific authorization or actual knowledge and acquiescence in a matter lying peculiarly within the secret knowledge of the two concerned in the offense, will effectually block most convictions and open the way for successful evasion through secret instructions and covert understandings. The protection of important social interests may thus be sacrificed to a too-zealous concern for individual interests of only trifling importance. Since in such cases deterrence is the essential objective, the present tendency of the law to hold the master criminally liable even for the unauthorized and unknown acts of his servant

seems justified, and indicates a direction of sound growth. As long as courts are careful not to permit *respondeat superior* to creep into the true crime cases, masters and principals should be held criminally liable for the petty misdemeanors of their servants and agents which involve no moral delinquency or severe punishment and which are committed in the course of the master's business."

Moreover, even if we were to overrule *Koczwara* and hold that a liquor licensee who had done all he could to instruct his servants not to sell to minors cannot be liable for sales made in his absence and without his knowledge, we would still affirm appellant's conviction. For he did not do all he could in instructing his employees. §4-495 of the Liquor Code, supra, provides a safeguard for the licensee or his servant, agent, or employee. Under that section, a licensee or his servant, etc., may require one whose age may be in question to fill out and sign a card wherein the person must state that he is over the age of twenty-one and give his birth date. This signed statement in the possession of the licensee may be offered as a defense in all civil and criminal prosecutions for serving a minor, and no penalty is to be imposed if the courts are satisfied that the licensee acted in good faith. Appellant did not instruct his employees to follow this procedure; in fact, he was unaware of it. Thus, even if we were to overrule *Koczwara*, it would not benefit appellant, who failed to instruct his employees properly.

The judgment is affirmed.